MOTION FILED
FEB 22 2005

(5)

No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* JEROME R. MIKULSKI *ET UX*. IN SUPPORT OF PETITIONER

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MOTION OF JEROME R. MILUSKI *ET UX.* FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Jerome R. Mikulski and Elzetta C. Mikulski hereby move the Court, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief; a copy of the written consent of its counsel has been lodged with the Clerk of the Court. Respondent has failed to grant consent, thereby necessitating this motion.

The resolution of this case is of great importance to the Mikulskis who (as is more fully set forth in the section of the proposed *amici* brief headed "Interest of *Amici Curiae*") are the named plaintiffs and class representatives in four consolidated shareholder class action suits in which the proper scope of the removal jurisdiction of the federal courts with respect to claims seeking relief exclusively under state law, but for which the violation of a federal statute is an important factual element, has been placed squarely at issue. In their cases, as in this case, Congress did not establish a federal cause of action for violations of the relevant provision of the Internal Revenue Code, nor does the federal statute itself create any rights that corporations or corporate shareholders can enforce. The lower courts' refusals to remand in this case and in the Mikulskis' cases (which are now pending on consolidated appeal before the Sixth Circuit, Case No. 03-4486, and on petition for writ of certiorari before judgment in this Court, Case No. 04-1058) operate to expand significantly the limited removal jurisdiction of the federal district courts in the absence of diversity in ways contrary to the decisions of this Court and the overwhelming majority of the Circuits, and that usurp the authority of Congress to decide the contours of federal question jurisdiction within constitutional limits.

Specifically, Mr. and Mrs. Mikulski believe that their brief as *amici curiae* will aid the Court by (i) illustrating the struc-

tural and conceptual framework and import of the last twenty years of this Court's federal question and removal jurisprudence from *Merrell Dow Pharmaceuticals, Inc. v. Thompson* to *Beneficial National Bank v. Anderson*, establishing the proposition that the presence of even a "substantial" federal question in a state law cause of action is not a sufficient basis for federal removal jurisdiction absent a federal private right of action, (ii) explaining why the decision below cannot be reconciled with this Court's "substantial federal question" jurisprudence, and (iii) describing the errors committed by the court below in misunderstanding the import and near unanimity of the decisions in the other Circuits on this issue.

In order to provide the Court with such relevant information not already brought to the Court's attention by the parties, movants respectfully request the Court to grant them leave to file their *amici curiae* brief submitted herewith.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE FEDERAL DISTRICT COURTS MAY NOT EXERCISE REMOVAL JURISDICTION BASED SOLELY ON THE PRESENCE OF A SUBSTANTIAL FEDERAL QUESTION ASSERTED IN THE STATE LAW CLAIM FOR RELIEF UNLESS CONGRESS HAS CONFERRED A FEDERAL PRIVATE RIGHT OF ACTION	4
A. This Court's Decision in *Merrell Dow* Undermined the Continued Vitality of the "Substantial Federal Question" Doctrine	4
B. The Lower Federal Courts, Including the Sixth Circuit in Other Cases, Have Consistently Applied *Merrell Dow* to Require a Federal Private Right of Action for Federal Question Jurisdiction	5
C. This Court's Decision in *Beneficial National Bank v. Anderson* Removed Any Doubt about the Elimination of the Substantial Federal Question Doctrine as a Basis for Removal Jurisdiction by Holding that, Absent Diversity, There Are Only Two Ways a State Claim Can be Removed to Federal Court—Where Congress Expressly Provides or Where Complete Preemption is Present	11

TABLE OF CONTENTS—Continued

Page

D. *Grable*'s Three-Part Analysis Contains Two More Fundamental Flaws 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES Page

Amsouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2004) 6, 7

Barbara v. New York Stock Exchange, Inc., 99 F.3d 49 (2nd Cir. 1996) 8

Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Serv., Inc., 278 F.3d 1223 (11th Cir. 2002) 8

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003) 3, 4, 8, 11-15

Bhagwanani v. Howard University, 2005 U.S. Dist. LEXIS 775 (D.D.C. 1-17-05) 8, 9

Board of Trustees of Painesville Township v. City of Painesville, 200 F.3d 396 (6th Cir. 1999) 6, 7, 14

Bourke v. Carnahan, 2003 U.S. Dist. LEXIS 13399 (S.D. Ohio 7-1-03) 8, 12, 13

Burton v. Southwood Door Company, 305 F. Supp.2d 629 (S.D. Miss. 2003) 13

Butts v. Guardian Industries Corp., 981 F. Supp. 1062 (N.D. Ohio 1997) 8

Campbell v. SmithKline Beecham, 919 F. Supp. 173 (E.D. Pa. 1996) 9

Care Choices HMO v. Engstrom, 330 F.3d 786 (6th Cir. 2003) 6, 7

Casey v. Goulian, 273 F. Supp.2d 136 (D. Mass. 2003) 9

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 4

City of Huntsville v. City of Madison, 24 F.3d 169 (11th Cir. 1994) 8

City of Rome, N.Y. v. Verizon Communications, Inc., 362 F.3d 168 (2nd Cir. 2004) 7, 12

Dixon v. Coburg Dairy, Inc., 369 F.3d 811 (4th Cir. 2004) (en banc) 7, 11

TABLE OF AUTHORITIES—Continued

	Page
Dunlap v. G&L Holdings Group, Inc., 381 F.3d 1285 (11th Cir. 2004)	8
Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust for Southern Calif., 463 U.S. 1 (1983)	5, 6
Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing; Inc., 377 F.3d 592 (6th Cir. 2004)	5, 6, 7, 13, 14, 15
Handyman Network, Inc. v. Westinghouse Savannah River Co., 868 F. Supp. 151 (D.S.C. 1994)	9
Heydon v. MediaOne of Southeast Michigan, Inc., 327 F.3d 466 (6th Cir. 2003)	5, 7
Horowitz v. Marlton, 116 F. Supp.2d 551 (D.N.J. 1999)	9
Hoskins v. Bekins Van Lines, 343 F.3d 769 (5th Cir. 2003)	14
Howery v. Allstate Insurance Co., 243 F.3d 912 (5th Cir. 2001)	8, 13, 14
Hunter v. Ohio Veterans Home, 272 F. Supp.2d 692 (N.D. Ohio 2003)	8
In re Wireless Telephone Federal Cost Recovery Fees Litig., 343 F. Supp.2d 838 (W.D. Mo. 2004)	9
In re Wireless Telephone Radio Frequency Emissions Products Liab. Litig., 327 F. Supp.2d 554 (D. Md. 2004)	9
Jackson v. Purdue Pharma. Co., 2003 U.S. Dist. LEXIS 6998 (M.D. Fla. 4-11-03)	9
Jacoboni v. KPMG LLP, 314 F. Supp.2d 1172 (M.D. Fla. 2004)	10
Jairath v. Dyer, 154 F.3d 1280 (11th Cir. 1998)	8, 11

TABLE OF AUTHORITIES—Continued

	Page
Long v. Bando Manufacturing of America, Inc., 201 F.3d 754 (6th Cir. 2000)	5, 6, 7, 12, 13
Loussides v. America Online, Inc., 175 F. Supp. 2d 211 (D. Conn. 2001)	9
Meinders v. Refco Securities, Inc., 865 F. Supp. 721 (D. Colo. 1994)	8
Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986)	*passim*
Mulcahy v. Columbia Organic Chem. Co., Inc., 29 F.3d 148 (4th Cir. 1994)	7, 11
Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244 (6th Cir. 1996)	14
Neel v. Pippy, 247 F. Supp.2d 707 (E.D. Pa. 2003)	9
Nicodemus v. Union Pacific Corp., 318 F.3d 1231 (10th Cir. 2003)	7, 14
PCS 2000 LP v. Romulus Telecomms., Inc., 148 F.3d 32 (1st Cir. 1998)	7
Quintal v. New England Regional Council of Carpenters, 2003 U.S. Dist. LEXIS 16386 (D. Mass. 9-18-03)	10
Rogers v. Platt, 814 F.2d 683 (D.C. Cir. 1987)	8
Savalle v. Nestle Waters North America, Inc., 289 F. Supp.2d 31 (D. Conn. 2003)	9
Seinfeld v. Austen, 39 F.3d 761 (7th Cir. 1994), *cert. denied sub nom. Abbott Lab. v. Seinfeld*, 514 U.S. 1126	7, 11, 13, 14
Smith v. Industrial Valley Title Insurance Co., 957 F.2d 90 (3rd Cir. 1992)	10
State of Montana v. Abbot Laboratories, 266 F. Supp.2d 250 (D. Mass. 2003)	9
TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000)	6, 7

TABLE OF AUTHORITIES—Continued

	Page
Tempelman v. Colsia, 2002 U.S. Dist. LEXIS 19037 (D.N.H. 9-26-02)	10
Terrebonne Homecare, Inc. v. SMA Health Plan, Inc., 271 F.3d 186 (5th Cir. 2001)	14
Utley v. Varian Assoc., Inc., 811 F.2d 1279 (9th Cir. 1987)	7
Wagner v. Regent Inv., Inc., 903 F. Supp. 966 (E.D. Va. 1995)	9
Wander v. Kaus, 304 F.3d 856 (9th Cir. 2002)	7
Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781 (5th Cir. 2000)	14
Willy v. Coastal Corp., 855 F.2d 1160 (5th Cir. 1988)	7
Zubi v. AT&T Corp., 219 F.3d 220 (3rd Cir. 2000)	7
JUDICIAL CODE	
28 U.S.C. § 1331	11
28 U.S.C. § 1441	4
INTERNAL REVENUE CODE	
26 U.S.C. § 312(n)(1)	2
26 U.S.C. § 6045(e)(3)	10
SUPREME COURT RULES	
Rule 37.6	1
OTHER AUTHORITIES	
E. Chemerinsky, FEDERAL JURISDICTION 284-85 (3d ed. 1999)	9

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BRIEF OF *AMICI CURIAE* JEROME R. MIKULSKI *ET UX.* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Jerome R. Mikulski and Elzetta C. Mikulski are California taxpayers who have been shareholders of Centerior Energy Corp. and its successor, FirstEnergy Corporation (collectively "Centerior"), continuously since 1985. They are plaintiffs and named class representatives in four consolidated shareholder class action suits against Centerior arising from its fraudulent accounting practices which misinformed shareholders over the course of many years that they had received taxable dividends instead of tax-free returns of capital and

[1] Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

improperly instructed them to overpay their respective federal and state income taxes, thereby passing off approximately $500 million of Centerior's own tax liability onto its shareholders. The Mikulskis' state law claims for fraud and breach of contract on behalf of the shareholder class allege that this fraud had its origins in Centerior's violation of the effective date provisions of Section 312(n)(1) of the Internal Revenue Code, 26 U.S.C. § 312(n)(1). However, Congress did not provide a federal cause of action for violations of Section 312(n)(1), nor does the federal statute itself create any rights that corporate shareholders can enforce. Centerior removed the cases to federal district court which ruled that it had valid removal jurisdiction due to the presence of a substantial federal question based on the federal tax laws. The Mikulskis' appeal is pending before the Sixth Circuit, Case No. 03-4486, and their petition for writ of certiorari before judgment is pending before this Court, Case No. 04-1058.

Similarly, in this case, the Sixth Circuit held that Grable's state law claim to quiet title was deemed to be a federal question because it required the interpretation of a provision of the Internal Revenue Code. These refusals to remand in Grable and Mikulski significantly expand the limited jurisdiction of the federal district courts in removal situations and transform a simple violation of federal law as an element of a state law cause of action into a substantial federal question, contrary to the holdings of this Court and in conflict with the decisions of several other Circuits. Allowing these decisions to stand constitutes an open invitation for all litigants to remove a state law claim that includes a federal question, or merely alleges a violation of federal law, without having to show original jurisdiction in the district court. Such an open invitation will clog an already overburdened federal judicial system and is contrary to the guidance given by this Court's earlier decisions.

Mr. and Mrs. Mikulski have a strong interest in seeking reversal of the erroneous decision of the Court of Appeals for the Sixth Circuit in this case and asking the Court to announce explicitly that the conceptual framework and import of its prior holdings in *Merrell Dow Pharmaceuticals, Inc. v. Thompson* and *Beneficial National Bank v. Anderson* mean that the presence of a substantial federal question in a state law cause of action is not a sufficient basis for federal removal jurisdiction absent a federal private right of action. Their *amici* brief is submitted in the hope that it will be of assistance to the Court in analyzing the issues presented.

SUMMARY OF THE ARGUMENT

In *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), this Court reaffirmed the principle that the mere presence of a federal statute in an action that seeks relief solely under state law (*i.e.*, where a violation or interpretation of federal law is asserted as a factual or legal element of a state claim), even one that "preempts" state law, will not automatically provide a basis for removal jurisdiction, thus completing the structural framework for federal question jurisdiction that it began in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). The Court eliminated the "substantial federal question" doctrine as a sufficient basis for removal jurisdiction in *Beneficial National Bank*, just as it had for original jurisdiction in *Merrell Dow*, where Congress has not provided a federal private right of action for violation of the particular federal statute.

ARGUMENT

I. THE FEDERAL DISTRICT COURTS MAY NOT EXERCISE REMOVAL JURISDICTION BASED SOLELY ON THE PRESENCE OF A SUBSTANTIAL FEDERAL QUESTION ASSERTED IN THE STATE LAW CLAIM FOR RELIEF UNLESS CONGRESS HAS CONFERRED A FEDERAL PRIVATE RIGHT OF ACTION.

In the absence of diversity, a civil action filed in a state court may be removed to federal court only if the claim is one "arising under" federal law. *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), *citing* 28 U.S.C. § 1441(b). Whether a claim arising under federal law must be determined by applying the "well-pleaded complaint" rule. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a claim "arises under" federal law for jurisdictional purposes only if the plaintiff's statement of his own cause of action on the face of his properly pleaded complaint affirmatively shows that it is based upon federal law. *Beneficial National Bank, supra*, at 7; *Caterpillar, supra*, at 392. As this Court has recently reaffirmed:

> As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

Beneficial National Bank, supra, at 7.

A. This Court's Decision in *Merrell Dow* Undermined the Continued Vitality of the "Substantial Federal Question" Doctrine.

This Court began the erosion of the "substantial federal question" doctrine as a valid exception to the well-pleaded complaint rule in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). In the context of a district court's original jurisdiction, this Court held in *Merrell Dow*

that, absent a federal private right of action or remedy, federal courts could not exercise "arising under" jurisdiction where violation of a federal statute was an element of a state law claim. The linchpin of the *Merrell Dow* holding is the absence of a private federal cause of action for the violation of the federal law involved; in such circumstances, the violation of a federal statute, pleaded as an element of a state law cause of action, does not state a claim "arising under" federal law—"[t]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 813. This Court noted that the congressional determination not to provide a private federal remedy for violation of a federal statute is "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction." *Id.* at 814.

B. The Lower Federal Courts, Including the Sixth Circuit in Other Cases, Have Consistently Applied *Merrell Dow* to Require a Federal Private Right of Action for Federal Question Jurisdiction.

Although the Sixth Circuit's decision below significantly relies on its previous ruling in *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000), five other contrary decisions by the Sixth Circuit (three of them subsequent to *Long* and before *Grable*) indicate that the Sixth Circuit properly understands *Merrell Dow* to limit this Court's prior decision in *Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust for Southern Calif.*, 463 U.S. 1 (1983), by requiring a federal private right of action to confer federal question jurisdiction.

In *Heydon v. MediaOne of Southeast Michigan, Inc.*, 327 F.3d 466, 471-72 (6th Cir. 2003), the Sixth Circuit explicitly

concluded that *Merrell Dow* had limited the application of the substantial federal question exception announced in *Franchise Tax Board*, and held that "[b]ecause the Cable [Communications Policy] Act does not provide the [p]lain-tiffs] with a private cause of action, no federal question jurisdiction exists." In *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622-24 (6th Cir. 2000), the Sixth Circuit affirmed the existence of valid federal question jurisdiction over the plaintiff's claim only because it held that 47 U.S.C. § 253(c) authorizes a private right of action in federal court for claims by telecommunications providers of "barrier-to-entry" injuries:

> the Supreme Court held in *Merrill* [*sic*] *Dow* . . . that "when Congress has determined that there should be no private federal cause of action . . . [a claimed] violation does not state a [federal question]."

TCG Detroit, 206 F.3d at 622 n.2, *quoting Merrell Dow*, *supra*, 478 U.S. at 817. Similarly, in *Care Choices HMO v. Engstrom*, 330 F.3d 786, 791 (6th Cir. 2003), federal jurisdiction was found to be lacking explicitly because Section 1395mm(e)(4) of the Medicare Act did not contain a private right of action.[2]

In a fifth case decided after *Grable*, *Amsouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004), the Sixth Circuit confirmed its correct understanding that *Merrell Dow* limits the prior holding of *Franchise Tax Board* by requiring a federal private right of action to support removal jurisdiction:

> Because the Bank Secrecy Act does not create a private right of action, the Receivers' incorporation of its standards

[2] The fourth case was decided by the Sixth Circuit prior to *Long*. In *Board of Trustees of Painesville Township v. City of Painesville*, 200 F.3d 396, 399-400 (6th Cir. 1999), the Sixth Circuit affirmed the district court's dismissal, in part, for lack of federal question jurisdiction because Sections 1255, 1282 and 1284 of the Clean Water Act did not provide plaintiffs with a private right of action.

> into a state-law cause of action cannot transform their complaint into one that raises a federal question.

Id. at 777.

Thus, in five cases decided since 1999—*Amsouth Bank*, *Heydon*, *Engstrom*, *TCG Detroit* and *City of Painesville*—the Sixth Circuit has clearly recognized the requirement of a private right of action as a prerequisite to the existence of federal question jurisdiction. To the extent that *Long* and *Grable* did not require a federal private right of action, they constitute departures from established law and ignore the limitations imposed by *Merrell Dow*.

The Courts of Appeals in ***ten*** other circuits[3] have joined the Sixth Circuit in holding that, where violation of a federal statute is a necessary element of a state law claim, the federal statute must provide a private remedy for its violation in order for federal question jurisdiction to exist.

[3] *See, e.g., PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998) ("[u]nless a federal statute bestows a private right of action, courts ought to presume that Congress did not intend the statute to confer federal jurisdiction"); *City of Rome, N.Y. v. Verizon Communications, Inc.*, 362 F.3d 168, 176 (2nd Cir. 2004); *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3rd Cir. 2000); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir. 2004) (en banc); *Mulcahy v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 152 (4th Cir. 1994) ("[u]nder *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) ("*Merrell Dow* held that a private federal remedy was a necessary predicate to determining whether the presence of a federal element in a state-created cause of action resulted in that cause of action being one which arose under federal law"); *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994)("[u]nder *Merrell Dow*, therefore, 'if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" federal question'"), *quoting Utley v. Varian Assoc., Inc.*, 811 F.2d 1279, 1283 (9th Cir. 1987); *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002); *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1238 (10th Cir. 2003) (since Congress did not intend to

Furthermore, numerous district court decisions within the Sixth Circuit[4] and around the country[5] have similarly held

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confer federal question jurisdiction over the construction of federal land grants, "[u]nder *Merrell Dow*, this absence is fatal"); *Dunlap v. G&L Holdings Group, Inc.*, 381 F.3d 1285, 1292 (11th Cir. 2004) ("it is now well established that federal jurisdiction is not created by the mere fact that proof of violation of a federal statute is an element of a plaintiff's state-law cause of action"), *citing Merrell Dow*, 478 U.S. at 814; *Jairath v. Dyer*, 154 F.3d 1280, 1284 (11th Cir. 1998); *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987). *But see Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Serv., Inc.*, 278 F.3d 1223, 1234 (11th Cir. 2002) (interpreting *Merrell Dow* to allow for the possibility that there could be an "exceptional federal statute that does not provide for a private remedy but still raises a federal question substantial enough to confer federal jurisdiction when it is an element of a state cause of action"), *quoting City of Huntsville v. City of Madison*, 24 F.3d 169, 174 (11th Cir. 1994); *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 54 (2nd Cir. 1996) ("the existence *vel non* of such a private right of action is the starting point for our inquiry into the substantiality of the federal questions involved in a lawsuit"); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir. 2001).

[4] *See, e.g., Bourke v. Carnahan*, 2003 U.S. Dist. LEXIS 13399 at *16 (S.D. Ohio 7-1-03) (if the substantial federal question exception to the well-pleaded complaint rule survives after *Merrell Dow* and *Beneficial National Bank v. Anderson*, the mere construction of federal statutes as part of a state law claim, as opposed to an inquiry into the constitutionality of such statutes, "is of insufficient substances to create arising under, or federal question, jurisdiction warranting removal"); *Hunter v. Ohio Veterans Home*, 272 F. Supp.2d 692, 695 (N.D. Ohio 2003) (state cause of action for breach of contract should be handled by the state courts of Ohio because the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"), *quoting Merrell Dow, supra*, 478 U.S. at 813; *Butts v. Guardian Industries Corp.*, 981 F. Supp. 1062, 1064-65 (N.D. Ohio 1997) (mere reference to federal statutes in state law claims for relief does not create federal question jurisdiction).

[5] *Meinders v. Refco Securities, Inc.*, 865 F. Supp. 721, 723 (D. Colo. 1994) ("*Merrell Dow* simply stands for the proposition that in the absence of a federal private right of action, the presence of federal law in a state law claim is insufficient to establish federal jurisdiction"); *Bhagwanani v.*

that violations of federal law may underlie many state law causes of action, but will not confer federal jurisdiction if there is no federal private right of action under the federal statute at issue.

Expert commentators have also recognized the vital importance of a private federal cause of action following *Merrell Dow*. *See, e.g.*, E. Chemerinsky, FEDERAL JURISDICTION 284-85 (3d ed. 1999) ("without a federal cause of action, a federal law cannot be the basis for federal question jurisdiction. . . . A great many federal laws do not create private causes of action. . . . After *Merrell Dow*, none of these statutes can be the basis for federal question jurisdiction").

Where defendants have attempted to remove state law claims arguing that violations of federal tax statutes transformed plaintiffs' claims into federal ones, courts have consistently held that no substantial federal question existed to support removal jurisdiction and have remanded such cases

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Howard University, 2005 U.S. Dist. LEXIS 775 at *14 (D.D.C. 1-17-05) ("[u]nder *Merrell Dow*, a complaint alleging a violation of federal law as an element of a state cause of action does not raise a substantial question of federal law when 'Congress has determined that there should be no private, federal cause of action for the violation'"), *quoting Merrell Dow*, 478 U.S. at 818; *Loussides v. America Online, Inc.*, 175 F. Supp.2d 211, 214 (D. Conn. 2001); *Neel v. Pippy*, 247 F. Supp.2d 707 (E.D. Pa. 2003); *State of Montana v. Abbot Laboratories*, 266 F. Supp.2d 250 (D. Mass. 2003); *Horowitz v. Marlton*, 116 F. Supp.2d 551, 554-55 (D.N.J. 1999); *Savalle v. Nestle Waters North America, Inc.*, 289 F. Supp.2d 31 (D. Conn. 2003); *Campbell v. SmithKline Beecham*, 919 F. Supp. 173, 176 (E.D. Pa. 1996); *Jackson v. Purdue Pharma. Co.*, 2003 U.S. Dist. LEXIS 6998 at 19-20 (M.D. Fla.); *Wagner v. Regent Inv., Inc.*, 903 F. Supp. 966, 969-70 (E.D. Va. 1995); *Handyman Network, Inc. v. Westinghouse Savannah River Co.*, 868 F. Supp. 151, 154 (D.S.C. 1994); *Casey v. Goulian*, 273 F. Supp.2d 136, 138 (D. Mass. 2003); *In re Wireless Telephone Radio Frequency Emissions Products Liab. Litig.*, 327 F. Supp.2d 554, 558-59 (D. Md. 2004); *In re Wireless Telephone Federal Cost Recovery Fees Litig.*, 343 F. Supp.2d 838, 854 (W.D. Mo. 2004).

to state court. For example, in *Smith v. Industrial Valley Title Insurance Co.*, 957 F.2d 90, 93-94 (3rd Cir. 1992), the plaintiffs filed state law claims alleging violations of Section 6045(e)(3) of the Code. Following *Merrell Dow*, the Third Circuit remanded the case to state court because there was no federal private right of action for a violation of Section 6045(e)(3). Similarly, in *Quintal v. New England Regional Council of Carpenters*, 2003 U.S. Dist. LEXIS 16386 (D. Mass. 9-18-03), the plaintiff sued his former employer in state court for over-withholding his federal and state income taxes, and the defendant removed the action to federal district court. Following *Merrell Dow*, the district court remanded the case to state court because the relevant federal tax statutes did not provide a private right of action against an employer for wrongfully withholding too much tax. *Id.* at *4.

In *Tempelman v. Colsia*, 2002 U.S. Dist. LEXIS 19037 (D.N.H. 9-26-02), the defendant even attempted to re-characterize plaintiff's state law quiet title claim as really being a tax refund suit. The district court disagreed and remanded the case to state court for lack of federal question jurisdiction.

Finally, in another recent decision, the Middle District of Florida likewise held it did not have valid original federal question jurisdiction where the plaintiff's state law claims implicated federal tax issues. *Jacoboni v. KPMG LLP*, 314 F. Supp.2d 1172, 1181 n.11 (M.D. Fla. 2004) ("[t]he Court is unpersuaded that it should allow the state law claims to remain here [under supplemental jurisdiction] on the asserted basis that they involve some issues of federal tax law. This Court is no tax court. Any such issues can be handled equally well by a judge of the state court bench. In any event, any marginally greater familiarity this Court might have with tax issues is overbalanced by a state court judge's familiarity with predominant issues of state law").

Therefore, after *Merrell Dow* as properly understood and applied, where Congress has not provided a federal private right of action for the violation of a federal statute, a complaint alleging such a violation as an element of a state law cause of action no longer states a claim "arising under" federal law pursuant to 28 U.S.C. § 1331.[6]

C. This Court's Decision in *Beneficial National Bank v. Anderson* Removed Any Doubt about the Elimination of the Substantial Federal Question Doctrine as a Basis for Removal Jurisdiction by Holding that, Absent Diversity, There Are Only Two Ways a State Claim Can be Removed to Federal Court—Where Congress Expressly Provides or Where Complete Preemption is Present.

In *Beneficial National Bank*, this Court reaffirmed the principle that the mere presence of a federal statute in an action that seeks relief solely under state law, even one that "preempts" state law, will ***not*** provide a basis for removal jurisdiction. 539 U.S. at 7. This Court explicitly held that "a

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[6] Indeed, even when Congress does create a private cause of action for the violation of a federal law, the lower courts have consistently held that, "[if a] particular plaintiff is barred from bringing the private, federal cause of action, either substantively or procedurally, no federal subject matter jurisdiction exists over that plaintiff's state cause of action predicated on the violation of the same federal law." *Dixon v. Coburg Dairy*, 369 F.3d at 818; *see also Jairath v. Dyer*, 154 F.3d at 1283 & n.9 (finding no federal removal jurisdiction where "a private cause of action under the [federal statute] is available as an abstract matter," but "this particular plaintiff . . . has no standing to pursue the only federal private cause of action available"); *Seinfeld v. Austen*, 39 F.3d at 764 n.3 (rejecting defendant's argument "that federal law need not specifically grant these plaintiffs a private right of action as long as someone has been granted such a right in the statute"); *Mulcahy v. Columbia Organic Chem. Co.*, 29 F.3d at 152 ("because the [federal] remedy sought is unavailable here, a private cause of action under *Merrell Dow* does not, in truth, exist").

state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Id.* at 8 (citation and footnote omitted) (emphasis supplied).

By emphasizing that, in the absence of diversity, a state claim may be removed to federal court in only two circumstances, *Beneficial National Bank* does for removal jurisdiction what *Merrell Dow* effectively accomplished for original jurisdiction—it eliminates the use of a substantial federal question, without more, as a basis for federal removal jurisdiction of a state law claim.

A number of lower courts have similarly understood this Court's decision in *Beneficial National Bank*, but are obviously seeking explicit guidance from this Court on the issue. For instance, in the wake of the *Beneficial National Bank* decision, the Second Circuit has refused to apply the substantial federal question doctrine to support removal jurisdiction. *See City of Rome, N.Y. v. Verizon Communications, Inc.*, 362 F.3d 168, 176 (2nd Cir. 2004). In *Bourke v. Carnahan, supra*, after canvassing the pre-*Beneficial National Bank* case law and trying to reconcile the Sixth Circuit's application of the "uncertain" substantial federal question exception in *Long v. Bando* with *Merrell Dow* and cases decided by other federal courts, District Judge Frost concluded that:

> *Beneficial National Bank* apparently resolves much of the [former] uncertainty that has surrounded the validity of the substantial federal question exception. Although only the dissent targeted this point, the *Beneficial National Bank* majority effectively reconsidered removal jurisprudence. By recognizing removal ***only*** in cases involving a congressional mandate or complete preemption, ***the Court arguably eliminated the substantial federal question exception***.

Bourke v. Carnahan, 2003 U.S. Dist. LEXIS 13399 at *10 (S.D. Ohio) (first emphasis in original; second emphasis supplied). *See also Burton v. Southwood Door Company*, 305 F. Supp.2d 629, 633 n.4 (S.D. Miss. 2003) ("[w]hether the presence of a 'substantial federal question' in a given case remains a proper basis for removal would seem somewhat in doubt in light of the Supreme Court's declaration in *Beneficial National Bank v. Anderson* that 'a state claim may be removed to federal court in only two circumstances – when Congress expressly so provides . . . [or] through complete preemption'") (citation omitted).

D. *Grable*'s Three-Part Analysis Contains Two More Fundamental Flaws.

Grable sets forth a unique tripartite analysis for federal question jurisdiction over state law claims: "a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case." *Grable*, 377 F.3d at 595, *citing Long v. Bando*, 201 F.3d 754, 759 (6th Cir. 2000); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001); and *Seinfeld v. Austen*, 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied sub nom. Abbott Lab. v. Seinfeld*, 514 U.S. 1126. The Court in *Grable* proceeded to conclude that whether a "substantial question of federal law" is presented in a state law claim functionally turns on identifying a "substantial federal interest." 377 F.3d at 596. As the Sixth Circuit concluded: "In sum, Grable's quiet title action presents a federal question because it is rooted in the Internal Revenue Code, the correct interpretation of which represents a substantial federal interest." *Id.*

There are two additional errors in the Sixth Circuit's flawed three-part analysis. First, the Seventh Circuit in *Seinfeld v. Austen* does not support the holding in *Grable*; in fact, on the page following the page cited by the Sixth Circuit in *Grable*, the Seventh Circuit in *Seinfeld* requires, consistent with the analytical framework for which *amici* argue, the presence of a federal private right of action in order to find federal question jurisdiction. *See* 39 F.3d at 764. Furthermore, although the *Howery* case is cited correctly, it has been contradicted by three other Fifth Circuit decisions, two of which were decided since *Howery*. *See Hoskins v. Bekins Van Lines*, 343 F.3d 769, 772-73 (5th Cir. 2003); *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188-89 (5th Cir. 2001); *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 784 (5th Cir. 2000). All three recent Fifth Circuit decisions hold, consistent with *Beneficial National Bank*, that the complete preemption doctrine is the ***only*** exception to the well-pleaded complaint rule. In *Grable*, however, the Sixth Circuit apparently labors under the mistaken belief that the Fifth Circuit accords continuing vitality to a "substantial federal question" exception to the well-pleaded complaint rule.

Second, *Grable*'s holding that a "substantial federal interest" is sufficient to trigger federal question jurisdiction even in the absence of a private right of action has been explicitly rejected by both the Tenth Circuit and, significantly, an earlier Sixth Circuit decision. *See Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1236-38 (10th Cir. 2003) (although there is substantial federal interest in railroad rights-of-way, there is no federal jurisdiction without federal private right of action); *Board of Trustees of Painesville Township v. City of Painesville*, 200 F.3d 396, 400 (6th Cir. 1999), *citing Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996).

Inasmuch as the Sixth Circuit in *Grable* has apparently misunderstood the import of this Court's decisions in *Merrell Dow* and *Beneficial National Bank* and stands in conflict with the overwhelming majority of decisions in eleven federal appellate circuits, including the Sixth Circuit, further guidance from this Court as to the correct interpretation and proper scope of federal "arising under" jurisdiction would be beneficial, particularly as it relates to removal jurisdiction. If this Court finds the decision by the Sixth Circuit in this case to misapprehend or misapply the teachings of *Merrell Dow* and *Beneficial National Bank* undermining the continuing vitality of the substantial federal question doctrine, and if this Court concludes that the violation of a federal statute as an element of a state law cause of action does not support federal question jurisdiction where Congress has not created a corresponding federal private right of action, *amici* respectfully submit that the lower courts would benefit from this Court's further elucidation of the subject.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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